

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

Petition of Vermont Gas Systems, Inc.,)	
requesting a Certificate of Public Good pursuant)	
to 30 V.S.A. § 248, authorizing the construction)	
of the “Addison Natural Gas Project” consisting)	
of approximately 43 miles of new natural gas)	
transmission pipeline in Chittenden and Addison)	Docket No. 7970
Counties, approximately 5 miles of new)	
distribution mainlines in Addison County,)	
together with three new gate stations in)	
Williston, New Haven and Middlebury,)	
Vermont, In Re: Post Certification)	

**VERMONT GAS SYSTEMS, INC.’S
REPLY BRIEF**

NOW COMES Vermont Gas Systems, Inc. (“Vermont Gas,” “VGS,” or the “Company”), and respectfully replies¹ to proposed findings and conditions submitted by the following Non-Petitioners: (1) Kristin Lyons (“Ms. Lyons”); (2) the Vermont Public Service Department (“PSD” or “Department”); and (3) Michael Hurlburt (“Mr. Hurlburt”), as designated spokesperson and representative for the Hurlburts.²

1. Reply to Lyons

In her letter to the Board, Ms. Lyons requests a condition requiring VGS to return the contours of her land to its preexisting contours upon completion of construction and notes that the stipulation between VGS and counsel for Ms. Lyons only requires VGS to plant mature trees to block any visible portions of the VELCO corridor across Ms. Lyons’ land following construction.³

VGS objects to Ms. Lyons’ proposed conditions, which would apply the Company’s stipulation to all properties affected by the reroute and require the Company to restore her land to the original contours. The record evidence shows that the VELCO transmission structures will

¹ VGS filed a Proposed Decision on October 17, 2014 (“VGS Proposed Decision”). For purposes of efficiency, VGS does not repeat here facts and analysis already detailed in its direct submittal that are responsive to Non-Petitioners’ proposed decisions.

² Capitalized terms and acronyms not otherwise defined herein shall have the meaning set forth in the VGS Proposed Decision.

³ Letter of Ms. Lyons dated October 17, 2014.

not be visible from Old Stage Road.⁴ The Department's aesthetics witness conceded that the structures would likely not be visible.⁵ Further, Condition 14 of the CPG requires a post-construction aesthetics review with the PSD's consultant. Such a review would address any concerns regarding the VELCO transmission structures on other parcels.

As Ms. Simollardes testified, moreover, as to a condition requiring Ms. Lyons' land to be restored to its present contours, Vermont Gas cannot agree to an absolute condition with no way of knowing what VGS will encounter during pipeline construction.⁶ VGS respectfully submits that any condition to restore Ms. Lyons' land should be modeled after what VGS and the Town of Monkton agreed, prior to VGS's proposed Old Stage Road reroute, in the Memorandum of Understanding dated June 14, 2013 (the "Town of Monkton MOU"), as follows: "VGS shall take those measures reasonably necessary to restore any lands disturbed by construction of the transmission pipeline to the original grade, landscaping and vegetation with similar species."⁷

VGS, however, stands by its stipulation, only with Ms. Lyons, to plant mature trees on her property to provide screening of any visible portions of the VELCO transmission line.

2. Reply to Department

The Department recommends that the Board approve the VGS-proposed reroute, conditioned on VGS employing best practices with respect to necessary tree clearing and conducting a post-construction aesthetics review of the reroute in order to verify impacts and assess mitigation measures. VGS agrees with the Department's recommendation.

3. Reply to Mr. Hurlburt

Mr. Hurlburt submitted a brief on VGS's proposed Old Stage Road reroute dated October 14, 2014 (the "Hurlburt Brief"). The Hurlburt Brief addresses, among other things, the location and construction of the pipeline, provision of residential gas service, reopening the record to consider the merits of the Certificate of Public Good issued by the Board for Phase 1 of the Project (the "Phase 1 CPG") and VGS's soil management plan.

⁴ Buscher supp. pf. at 3; tr. 9/23/14 at 46 (Buscher).

⁵ Tr. 9/23/14 at 100-02 (Raphael).

⁶ *Id.* at 49-50 (Simollardes).

⁷ Town of Monkton MOU at 7.

3.1 The Location of the Pipeline

On pages 1 and 2 of the Hurlburt Brief, Mr. Hurlburt supports his Motion to Deny and Dismiss dated May 7, 2014 (the “May 7th Motion”), and Motion to Alter and Amend dated September 8, 2014 (the “September 8th Motion”), by reasserting that “the gas pipeline must be located entirely in the VELCO corridor.”⁸ Mr. Hurlburt alleges that since construction will not commence until the summer of 2015, newly impacted landowners will have ample time to express any concerns about the pipeline.⁹ Mr. Hurlburt claims that VGS’s proposed route on his property has undue adverse impacts to historic sites and future development of his property.¹⁰

VGS disagrees with Mr. Hurlburt’s claim that the Town of Monkton MOU requires that the pipeline be located entirely within the VELCO corridor on Old Stage Road and requests that the Board dismiss both the May 7th Motion and September 8th Motion. Mr. Hurlburt bases his argument on pipeline location as being “a condition of the Monkton MOU page 9 and a condition of the CPG page 1 line 3.”¹¹ Phase 1 CPG Condition 3 requires VGS to “comply with the provisions of [its] MOUs.” However, the citation to page 9 of the Town of Monkton MOU does not make sense in the context of Mr. Hurlburt’s argument, as this page primarily relates to miscellaneous agreements. Rather, the relevant clause on the siting and route of the pipeline is on page 2 of the Town of Monkton MOU and states that “VGS agrees subject to the approval of the Board, to site and construct the Project **within or adjacent to** the existing [VELCO] right of way in the Town.”¹² In compliance with the Town of Monkton MOU, VGS’s proposed Old Stage Road reroute is adjacent to the VELCO corridor. VGS is not required to site the pipeline entirely within the VELCO corridor. Further, a substantial portion of the proposed reroute on the Lyons, Martin, and Hurlburt properties is within the VELCO right-of-way.¹³

With respect to Mr. Hurlburt’s claim of undue adverse impact, VGS incorporates by this reference the Discussion section of its Proposal for Decision submitted to the Board on October 17, 2014 (“VGS’s Proposed Decision”), particularly the paragraphs analyzing the

⁸ Hurlburt Brief at 1.

⁹ *Id.* at 1.

¹⁰ *Id.* at 2.

¹¹ September 8th Motion at 1.

¹² (Emphasis added).

¹³ Billingsley supp. pf. at 4.

second prong of the *Quechee Test* analysis in that the appropriate perspective is of an average person in the community and not the landowners impacted by the reroute.¹⁴

Further, individual landowner interests are not at issue in Section 248 proceedings, as recently confirmed by this Board in 2011 when it denied individual landowner requests in a Section 248 proceeding, stating:

In its *Bandel* decision, the Vermont Supreme Court stated that in a Section 248 proceeding, 'The sole issue is the determination of whether or not under the criteria set forth in the statute the proposal for which a certificate is sought advances the public interest.' The Court continued: **'Individual property rights not being at issue, they are not a basis for any special recognition of the property owners, nor do they support any special consideration for their protection in these proceedings.'**¹⁵

The *Bandel* Court's proscription against basing Section 248 decisions upon individual property interests was recently re-confirmed by the Vermont Supreme Court in its 2012 ruling in *In re Petition of New Cingular Wireless*.¹⁶ In that case, adjacent landowners opposed the installation of a monopine telecommunications tower and associated facilities, arguing, amongst other claims, that the project would result in undue aesthetic impacts on their views and might adversely impact streams and wetlands on particular properties.¹⁷ After a failed motion to alter the Board's Order, the landowners appealed to the Vermont Supreme Court, arguing that the Board violated their procedural due process rights by failing to inform them of deadlines and denying them a meaningful opportunity to participate in the proceedings.¹⁸ The Court, finding that Section 248 does not require the Board to consider the specific interests of individual landowners, held that the landowners did not have a constitutionally protected property interest and, therefore, were not denied procedural due process.¹⁹ The Court confirmed that "CPG proceedings pursuant to . . . 30 V.S.A. § 248 . . . relate only to the issues of public good, not to the interests of private landowners who are or may be involved," emphasizing that "[a]s this Court concluded in *Bandel*, because the sole issue was whether the requested certificate

¹⁴ VGS's Proposed Decision at 12-13.

¹⁵ Docket No. 7628, Order of 5/31/2011 at 100 (emphasis added).

¹⁶ 2012 VT 46 at ¶ 15.

¹⁷ *Id.* at ¶ 3.

¹⁸ *Id.* at ¶ 7-10.

¹⁹ *Id.* at ¶ 13-19.

advanced the public interest, . . . property owners were not entitled to any special recognition or consideration.”²⁰

3.2 Construction of the Pipeline

On page 3 of the Hurlburt Brief, Mr. Hurlburt requests a pipeline depth of eight feet. Mr. Hurlburt does not identify the specific construction equipment that would be used, but states that “the drill” can bore for a mile and a half and “the saw” for cutting ledge can go up to eight feet deep.²¹ Mr. Hurlburt then requests the Board “to order [VGS] to install the pipeline at eight feet in depth and to cut ledge with no blasting.”²²

VGS opposes any requirement to install the pipeline at eight feet in depth or cut ledge with no blasting, as Mr. Hurlburt’s requests appear to be related to speculative harm to supposed archaeologically sensitive areas and impacts to streams and wetlands.²³ These concerns were addressed in VGS’s prefiled testimony and testimony before the Board on September 23, 2014. VGS has not been allowed access to the Hurlburt property to review for archeological concerns.²⁴ However, once VGS has access to the property, prior to any construction, a standard evaluation of archeological resources will be performed.²⁵ If archeologically sensitive areas are discovered, VGS will recover the artifacts, use an HDD drill to leave the artifacts undisturbed or realign the pipeline to avoid the artifacts.²⁶ With respect to streams and wetlands impacts, the reroute reduces the total impacts to wetlands by approximately 1000 square feet as compared to the prior alignment,²⁷ and no other streams, wetlands, vernal pools, flood plains or fluvial erosion hazard zones exist within the area impacted by the reroute.²⁸ Finally, VGS has obtained all necessary collateral permits for the impacts associated with the reroute.²⁹

While not specifically addressed in the Hurlburt Brief, any concerns related to possible, future installation of drainage tiles and impacts to wells on the Hurlburt property were also addressed in testimony before the Board on September 23, 2014. VGS has entered into a

²⁰ *Id.* (citing *Vt. Elec. Power Co. v. Bandel*, 135 Vt. 141, 145, 375 A.2d 975, 978 (1977)).

²¹ Hurlburt Brief at 3.

²² *Id.*

²³ *Id.*

²⁴ Tr. 9/23/14 at 58-59 (Simollardes). Of note, VGS’s environmental consultants accessed the Hurlburt property on July 5, 2012 and September 6, 2012, prior to VGS receiving notices of no trespass. Tr. 9/23/14 at 83 (Nelson), 98 (Simollardes).

²⁵ *Id.* at 32 (Nelson).

²⁶ *Id.* at 38 (Nelson).

²⁷ Nelson supp. pf. at 3; tr. 9/23/14 at 31 (Nelson).

²⁸ Nelson supp. pf. at 3.

²⁹ Tr. 9/23/14 at 51 (Simollardes).

Memorandum of Understanding with the Vermont Agency of Agriculture, Food and Markets that specifies how VGS is to work with agricultural landowners to ensure protection of existing drainage tiles as the Project is being constructed and how VGS is to repair tiles damaged during construction.³⁰ If drainage tiles are installed on Mr. Hurlburt's land at some point in the future, VGS will have a representative present to oversee the safe installation of the tiles.³¹ Finally, any blasting on the reroute would include, where applicable, pre and post-well testing for quality and quantity of water in accordance with the blasting plan for the Phase 1 Project.³²

VGS also opposes any requirement to install the pipeline at eight feet in depth or cut ledge with no blasting because of the impacts to the entire Phase 1 Project. With respect to depth, the deeper in depth at which VGS constructs the pipeline, the more likely VGS will encounter bedrock that would require blasting and result in additional impacts that would require mitigation.³³ Further, there is a significant cost for every foot deeper the pipeline is constructed,³⁴ and the amount of effort to construct the pipeline also increases.³⁵ With respect to blasting, there are three processes to remove ledge: excavator, trencher or blasting,³⁶ and specifics of the construction conditions encountered will dictate the appropriate rock removal approach.

3.3 Provision of Residential Gas Service

On page 3 of the Hurlburt Brief, Mr. Hurlburt requests residential gas service. VGS opposes any requirement to provide residential gas service for the proposed reroute, which would be inconsistent with the terms of the Town of Monkton MOU. Condition 3 of the Phase 1 CPG requires VGS to comply with the Town of Monkton MOU, which at Section III requires the "use [of] reasonable best efforts to complete construction of the Initial Monkton Distribution System within two years from the conclusion and gasification of the Project" While Mr. Hurlburt's property is not part of the Initial Monkton Distribution System, the Town of Monkton MOU envisions an expansion of the system,³⁷ which may at some point reach the Hurlburt property.

³⁰ *Id.* at 28-29 (Nelson), 53, 57 (Simollardes).

³¹ *Id.* at 59-60 (Simollardes).

³² *Id.* at 12-13 (Billingsley), 34-35 (Nelson); *see also* Town of Monkton MOU at 5-7

³³ Tr. 9/23/14 at 41 (Nelson).

³⁴ *Id.* at 59 (Simollardes).

³⁵ *Id.* at 41-42 (Nelson).

³⁶ *Id.* at 34 (Nelson).

³⁷ *See* Town of Monkton MOU at 3 ("the Initial Monkton Distribution System (or as later expanded).").

However, in addition to being inconsistent with the Town of Monkton MOU, an expansion to provide residential service is not relevant to the merits of the proposed reroute.

VGS therefore opposes any requirement to provide residential gas service in the Board's order on the proposed reroute.

3.4 Reopening the Record

On page 4 of the Hurlburt Brief, Mr. Hurlburt suggests that the Board should reopen the record to reconsider the merits of the Phase 1 CPG, apparently based on an alternative technology to VGS's proposed pipeline and speculation about a residential distribution infrastructure based on this alternative technology that makes the pipeline, as Mr. Hurlburt suggests, "for corporate good and not for public good." VGS requests that the Board dismiss Mr. Hurlburt's arguments for reopening the record.

In making his arguments, Mr. Hurlburt has not cited to any testimony or evidence in the record to support his suggestion of reopening the record or to any relevant legal authority that would permit the Board to reopen the record at this stage. Thus, the Board should not reopen the record, especially in light of the Board's Order of October 10, 2014, in this Docket, deciding not to reopen the record, which was issued four days prior to the filing of the Hurlburt Brief.

3.5 The Soil Management Plan

On pages 5 and 6 of the Hurlburt Brief, Mr. Hurlburt discusses VGS's soil management plan and soil testing on his property, which culminates in a possible breach of contract claim against Vermont Gas. Mr. Hurlburt has also attached a handwritten, temporary Right of Entry Agreement (the "ROE Agreement") to perform soil testing, signed by Michael and David Hurlburt, PricewaterhouseCoopers, Vanasse Hangen Brustlin, and the Vermont Agency of Natural Resources.³⁸ The ROE Agreement only permitted access to the Hurlburt property on August 22, 2014 to take soil samples by hand auguring near VELCO pole number 251, and provided that the results of the soil test be sent to the Hurlburts.³⁹ In the Hurlburt Brief, Mr. Hurlburt states that VELCO removed poles and disturbed soils in six locations, but only one of VGS's three proposed locations for soil testing involved an area where VELCO removed poles and disturbed soils.⁴⁰ Mr. Hurlburt alleges that he has not received the soil test results.⁴¹

³⁸ See Hurlburt Brief at attachment.

³⁹ *Id.*

⁴⁰ *Id.* at 5-6.

⁴¹ *Id.* at 6.

Mr. Hurlburt then requests that the Board direct VGS to conduct more hand-augured soil testing in the five other locations where VELCO removed poles and disturbed soils and to provide the Hurlburts with the soil test results for the one site.⁴²

VGS requests that the Board disregard Mr. Hurlburt's request for additional soil testing as such testing is not relevant to the proposed reroute, and VGS has already completed the soil testing required by ANR in order to comply with VGS's soil management plan. However, to address Mr. Hurlburt's request, VGS points to the ROE Agreement, which only allowed soil samples to be taken at one location and by hand auguring instead of a boring rig.⁴³

Thus, there is no basis for a breach of contract claim with respect to the ROE Agreement.⁴⁴

⁴² *Id.*

⁴³ Hurlburt Brief at attachment.

⁴⁴ VGS represents that it had originally agreed with Mr. Hurlburt's father to perform soil testing on at least two locations on the Hurlburt property but that agreement was rescinded by Mr. Hurlburt, who then himself drafted the handwritten ROE Agreement, limiting the testing to one location and the method of boring to hand auguring. Mr. Hurlburt has now requested expanding the soil testing to the five other VELCO sites, contradicting the intent of the handwritten contract he drafted and signed, which was to limit VGS's testing on his property. Therefore, in addition to the rationales stated above for disregarding Mr. Hurlburt's request for additional soil testing, VGS also asks that the Board disregard this request as contrary to the intent of the ROE Agreement drafted and signed by Mr. Hurlburt.

VGS requests that the Board disregard Mr. Hurlburt's request to direct VGS to provide the Hurlburts with the soil test results as this request is now moot. VGS represents that it received the soil test results from VHB on October 8, 2014, and Mr. Pughe of VGS mailed the Hurlburts the soil test results on that day and has mailed the soil test results to the Hurlburts again on October 21, 2014, in response to the allegation in the Hurlburt Brief. Thus, there is no basis for a breach of contract claim with respect to the ROE Agreement.

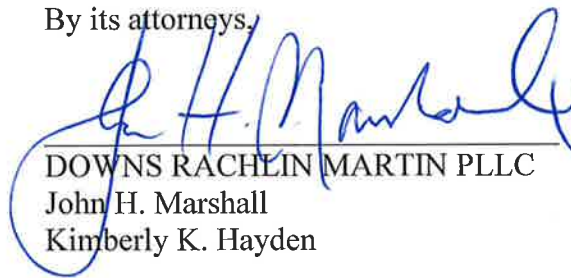
4. Conclusion

Based upon the foregoing and the reasons set forth in VGS's Proposed Decision, VGS respectfully asks the Board to approve the reroute as proposed by VGS, issue an Order substantially in the form reflected in VGS' Proposal for Decision, and dismiss both the May 7th Motion and the September 8th Motion filed by Mr. Hurlburt.

DATED at St. Johnsbury, Vermont, this 31st day of October, 2014.

VERMONT GAS SYSTEMS, INC.

By its attorneys,



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